IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 706

ALBERT BLOOM,

Petitioner,

—v.—

CHARLES LUNDSTROM, TROOPER,

Respondent.

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

With flagrant disregard for the confines of the record in this cause, respondent—on the basis of factual material completely foreign to the record—urges this Court to deny review of the Connecticut judgment which sanctions petitioner's extradition on a record which establishes petitioner was not substantially charged with a crime within the meaning of the constitutional and statutory provisions regarding extradition.

Respondent does not quarrel with petitioner's formation of the questions presented by this case[1] or petitioner's reasons why the writ should issue. And respondent completely abandons the rationale of the Connecticut courts

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[1] Under Rules 24.1 a and 40.1 of the Rules of this Court, respondent could have reframed the questions presented if he so desired. Apparently his failure to do so indicates an agreement with the questions presented by petitioner.

which have ruled in his favor.[2] Rather respondent argues his cause on the merits and attempts to justify the Connecticut Governor's extradition warrant upon evidence never before the Connecticut Governor and *dehors* the record in this habeas corpus action.

By way of reply, petitioner urges these points:

I.

In his entire brief, respondent makes *not one single reference* to the record upon which the Connecticut courts acted. Instead, respondent:

(1) Recites, in four of the paragraphs of his 12-paragraph statement section and in two of the three footnotes in that section (Res. Br. 2-4),[3] facts not in the record.

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[2] The Connecticut trial court held that the certification by the Governor of New York that petitioner was a parole violator "is sufficient" (Appendix 5a) to determine that petitioner is subject to extradition. The Connecticut Supreme Court answered what it considered to be the "sole question" of the case with its ruling that:

> "[A] copy of the information upon which he was prosecuted as a second offender was not essential to the validity of the extradition request" (Appendix 13a).

Without a single mention of either the New York certification or the "sole question" ruled upon by the Connecticut Supreme Court, respondent urges this Court to deny review on the basis of material clearly not in the record.

[3] References are indicated as follows:

References to the numbered pages of the appendix to the petition for a writ of certiorari — (Appendix a)

References to the numbered pages of the appendix to this brief — Reply Appendix a

References to the numbered pages of respondent's brief in opposition — Res. Br.

References to the numbered appendices annexed to respondent's brief — Res. App.

References to the numbered pages of the appendix to petitioner's brief filed in the Connecticut Supreme Court of Errors — Pet. Sup. Ct. App.

(2) Makes cryptic references to a fractional portion of a 13-year-old affidavit purportedly signed by petitioner and to the existence of a 13-year-old, unquoted, apparently insignificant affidavit executed by petitioner's Massachusetts counsel (Res. Br. 6), neither of which are in the record; and

(3) Appends to his brief a purported second offender information and a purported 1937 New York judgment reciting the second offender charge (Res. App. 1, 2), neither of which are in the record.

The extraneous item upon which respondent most heavily relies—the 1937 judgment purporting to both charge and sentence petitioner as a second offender (Res. App. 2)—was specifically ordered stricken from the record by the Connecticut Supreme Court of Errors by an order signed by Chief Justice Baldwin on November 21, 1961.

Petitioner's motion to strike the improper substituted judgment, as well as the Supreme Court order, is set forth as Appendix G to this brief (Reply Appendix 4a). The motion and order also appear as the first, second and third typewritten pages of the record, certified by the clerk of the court below under date of January 4, 1962, on file with the clerk of this Court. To demonstrate that the judgment stricken by the Supreme Court of Errors is identical to the judgment appended to respondent's brief, a certified copy of respondent's brief in the Connecticut Supreme Court of Errors containing the stricken matter is being filed with this reply brief.

Neither this substituted judgment (Res. App. 2) nor the second felony offender information (Res. App. 1) were presented to the Connecticut Governor or to the Connecticut trial court and, as noted, when the substituted judgment (Res. App. 2) was presented to the Connecticut

Supreme Court for the first time on appeal, that court ordered the substituted judgment stricken.[1]

Petitioner is well aware that he invokes this Court's discretion in seeking review by way of certiorari. He is well aware that the denial of this court's writ of certiorari does not import approval of the judgment below. But for this Court to give *any* consideration to material clearly inadmissible in the Connecticut trial court, to material *dehors* the record, and to material specifically stricken by the Connecticut Supreme Court would be to violate the spirit of Justice Holmes' opinion in *Saunders* v. *Shaw*, 244 U. S.

[1] Significantly, the documents appended to respondent's brief and upon which respondent so heavily relies were clearly inadmissible in the Connecticut trial court. This action was brought to test the legality of petitioner's restraint imposed by virtue of the Connecticut Governor's extradition warrant. Obviously, documents which were not before the Governor were inadmissible to substantiate New York's request for extradition. Moreover, both federal and state law emphasize that any charge, information, indictment or judgment which is the basis for an extradition request must be certified by the Governor of the demanding state. 18 U.S.C. §3182 (Appendix 1a); §54-159 Conn. Gen. Stat. (1958 Rev.) (Reply Appendix 7a). This requisite is missing from the material improperly submitted to this Court in appendix form.

It is doubtful if this certificate could possibly be forthcoming. In the 1937 New York judgment submitted to the Governor and properly in evidence, it is clearly stated that petitioner "having had two days notice of sentence" was sentenced as a second offender on *March 25, 1937*. (Appendix 22a.) Yet respondent's purported judgment annexed to his brief and the second offender information state that the information charging petitioner as a second offender was filed on *March 25, 1937*. (Respondent's App. 1, 2.) In respondent's copy of the 1937 "judgment" those words indicating that the two day notice was given and which clearly appear in the original (Appendix 22a) are omitted. The New York Governor certified that the 1937 judgment which is in evidence was "authentic and duly authenticated in accordance with the Laws of" New York. (Pet. St. Ct. App. 7.) Petitioner makes no claim *at this time* that the two day notice is an absolute necessity, but if the New York Governor certified that it was given when he asked the Connecticut Governor to extradite, he could not now certify as authentic a judgment which makes no reference to the two day notice.

317, 319 (1917), where this Court unanimously held that the plaintiff in error "has been deprived of due process of law contrary to the Fourteenth Amendment, because the case has been decided against him [on appeal] without his ever having had the proper opportunity to present his evidence."

II.

By cramming such an abundance of material foreign to the record in his brief, respondent, in fact, recognizes the weakness of the supporting documents actually in the record and upon which the instant extradition warrant was issued.

The only one of respondent's five arguments which remotely deals with the record properly before this Court is point IV in which respondent argues:

> "[T]here is no requirement whatsoever that a judgment of conviction refer to the filing of a multiple felony information, nor has petitioner cited any such requirement . . .
>
> "New York Code of Criminal Procedure, 484, which specifies what papers shall constitute the judgment-roll, does not include a multiple offender information" (Res. Br. 10-11).

Significantly, this argument was never advanced by respondent in any of the courts below.

Moreover, respondent's argument is in patent conflict with the New York Code of Criminal Procedure. 484, contrary to respondent's assertion, makes no reference whatsoever to the proper contents of a criminal judgment, but deals with the court's power to remit fines. 485 deals with the contents of the judgment roll and specifies that the judgment roll shall include "a copy of the minutes of the judgment" (Reply Appendix 1a).

And 485a of the Code of Criminal Procedure specifically provides that the *minutes* shall include the "nature of the prior offense or offenses which is the basis for sentence" as a second or multiple offender, "the date or dates of such prior conviction or convictions and the court or courts in which such prior conviction or convictions was had . . ." (Reply Appendix 6a).

The 1937 New York judgment presented to the Connecticut Governor—the only New York judgment properly before this Court (Appendix 22a)—demonstrates that petitioner was sentenced as a second offender without being charged as a second offender. Respondent at no place even suggests such a practice is proper. On the face of the supporting documents, then, petitioner owed no unserved sentence to New York at the time of his release in 1954. An extradition warrant based on such documents cannot stand, consistent with the demands of the Constitution and the laws of the United States and the decisions of this Court.

CONCLUSION

Respondent's sole argument based on the record in this case is clearly without merit. His attempt to thwart this Court's review of the judgment below by the injection of extraneous material, the most significant of which was specifically stricken by the Connecticut Supreme Court, demonstrates the inherent weakness of the supporting documents upon which petitioner's extradition has been justified by the Connecticut executive and judiciary.

Petitioner's present whereabouts, as respondent recognizes, is no secret. If the State of New York has documents which properly permit petitioner's extradition—although to date petitioner has not been presented with

such documents—certainly a proper extradition request could be made. But to tolerate respondent's manipulation of the record at this appellate stage of the instant habeas corpus action in order to justify the judgment of the court below most certainly would "ride rough" shod over this Court's proud boast that "The great writ of habeas corpus has been for centuries esteemed the best and only sufficient defense of human freedom." *Ex Parte Yerger*, 74 U. S. (8 Wall.) 85, 95 (1868).

Certainly, if two sovereign states are to combine to compel petitioner to serve the balance of a 20 year sentence imposed for forging a $22.50 check after petitioner has served 14 years 9 months and 22 days for that offense, their actions must fit within the prescriptions of the Constitution and the laws of the United States.

For these reasons and for the reasons advanced in the petition, then, this Court should—and petitioner respectfully requests that it does—issue its writ of certiorari to review the judgment of the court below.

Respectfully submitted,

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Dated: March 8, 1962

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[Appendices A–F Are Annexed to the Petition for a Writ of Certiorari Filed February 5, 1962.]

APPENDIX G

MOTION TO STRIKE AND ORDER

SUPREME COURT OF ERRORS

STATE OF CONNECTICUT

September 5, 1961

No. 111476 (Superior Court)

No. 5150 (Supreme Court of Errors)

ALBERT BLOOM,

Petitioner,

—v.—

CHARLES LUNDBURG, AN OFFICER OF THE CONNECTICUT STATE POLICE,

Respondent.

MOTION TO STRIKE AND EXPUNGE APPENDIX TO RESPONDENT'S BRIEF

1. Pursuant to §54-166 (Conn. Gen. Stat. 1958 Rev.), petitioner initiated this habeas corpus action to test the legality of his restraint by virtue of a warrant of extradition issued by the Governor of Connecticut on demand of the Governor of New York. Petitioner maintains that, because, *inter alia*, the demanding State's supporting documents (Petitioner's Exhibit A) demonstrate that petitioner is not substantially charged with a crime, the Connecticut Chief Executive is depriving him of his constitu-

Appendix G
Motion to Strike and Order

tional and federal statutory right, as well as his Connecticut statutory right, not to be extradited.

2. Petitioner's claim is predicated upon, *inter alia*, the showing upon the face of the New York supporting documents (Petitioner's Exhibit A) that petitioner was not charged as a second offender and had completed his 1937 New York maximum sentence when paroled.

3. To meet petitioner's contention, respondent alleges that petitioner was properly charged as a second offender and, to substantiate this claim, unfounded on the evidence in this cause, annexed, as Respondent's Appendix I, to his brief, what respondent refers to as a "certified copy of judgment of Westchester County Court," certified 13 days after the judgment rendered on this cause in the court below.

4. Said "certified copy of judgment of Westchester County Court" in the appendix to respondent's brief was not presented in evidence in the court below and is *dehors* the record in this appeal.

5. Said "certified copy of judgment of Westchester County Court" was inadmissible in evidence in the court below because of, *inter alia*, provisions of 18 U. S. C. §3182 and §54-159 Conn. Gen. Stat., 1958 Rev.).

6. Consideration of said "certified copy of judgment of Westchester County Court" on the instant appeal would constitute a denial of due process of law, as guaranteed by the Fourteenth Amendment to the United States Constitution.

Appendix G
Motion to Strike and Order

Wherefore, petitioner moves this Court to strike and expunge Respondent's Appendix I, containing said "certified copy of judgment of Westchester County Court."

The Petitioner,

By GOLDSTEIN AND PECK
His Attorneys

This is to certify that on this date a copy of this document was mailed via U. S. Mail, postage prepaid, to:

Honorable Otto J. Saur
State's Attorney
172 Golden Hill Street
Bridgeport, Connecticut

Dated at Bridgeport, Connecticut, this 5th day of September, 1961.

GOLDSTEIN AND PECK

By /s/ JACOB D. ZELDES
955 Main Street
Bridgeport, Conn.

November 21, 1961.
Motion granted
By the Court
Baldwin, C.J.

APPENDIX B

ADDITIONAL STATUTORY PROVISIONS INVOLVED

485 N. Y. Code of Criminal Procedure

"When judgment upon a conviction is rendered, the clerk must enter the same upon the minutes, stating briefly the offense for which the conviction has been had; and must, upon the service upon him of notice of appeal, immediately annex together and file the following papers, which constitute the judgment roll:

"1. A copy of the minutes of a challenge interposed by the defendant to a grand juror, and the proceedings and decision thereon;

"2. The indictment and a copy of the minutes of the plea or demurrer;

"3. A copy of the minutes of a challenge, which may have been interposed to the panel of the trial jury, or to a juror who participated in the verdict, and the proceedings and decision thereon;

"4. A copy of the minutes of the trial;

"5. A copy of the minutes of the judgment;

"6. A copy of the minutes of any proceedings upon a motion either for a new trial or in arrest of judgment;

"7. The case, if there be one;

"8. When the judgment is of death or of life imprisonment following a recommendation of a jury pursuant to section ten hundred forty-five-a of the penal law, the clerk of the court in which the conviction was had shall, within thirty days after a

notice of appeal shall be served upon him, cause to be prepared and printed, as required by the general rules of practice, the record and judgment roll upon which the appeal is to be heard as prescribed in this section and in section four hundred and fifty-six of this act and, after being duly certified by him, cause the same to be filed with the clerk of the court of appeals or with the clerk of the appellate division of the supreme court, as the case may be, and must cause to be forwarded to the said clerk the number of copies of the record and judgment roll which are required by the rules of the court of appeals or of the appellate division of the supreme court, as the case may be, which shall form the case and exceptions upon which the appeal shall be heard, and three copies shall also be furnished to the defendant's attorney and three to the district attorney and; where the judgment is of death, one to the governor of the state, and the remainder distributed according to the rules of the court of appeals or of the appellate division of the supreme court, as the case may be. In such cases of life imprisonment as hereinbefore specified, where a further appeal is allowed to the court of appeals, said appeal shall be heard by the court of appeals upon seven copies of the record in the appellate division of the supreme court, said copies to be furnished by the clerk of the court in which the conviction was had. The expense of preparing and printing the judgment-roll in such case shall be a county charge, payable out of the court fund upon the certificate of the county clerk, approved by the county judge or a justice of the supreme court residing in the county in which the con-

viction was had. As amended L. 1885, c. 520; L. 1887, c. 493, § 1; L. 1889, c. 379; L. 1897, c. 427, § 1; L. 1916, c. 230; L. 1943, c. 201; L. 1944, c. 208, eff. March 21, 1944."

§485-a *N. Y. Code of Criminal Procedure*

"It shall be the duty of the court in which any person shall be convicted of an offense punishable in a state prison, before passing the sentence therefor, to ascertain by the examination of such convict on oath, and in addition to such oath, by such other evidence as can be obtained, whether such convict had learned and practiced any mechanical trade, and in like manner such other facts tending to indicate the causes of the criminal character or conduct of such convict, as to the court shall seem proper and desirable, and the court shall direct the clerk of the court to enter such of the facts so ascertained, and such other facts as to the court shall seem proper and desirable, upon the minutes of the court, and said clerk shall include a copy thereof in the certified copy of the sentence of such convict which shall be delivered to the sheriff of the county in which such conviction shall be had. Whenever such a person is sentenced as a second, third or fourth felony offender under the provisions of sections nineteen hundred forty-one or nineteen hundred forty-two of the penal law, it shall be the duty of the court to direct the clerk of the court to enter upon the minutes of the court the nature of the prior offense or offenses which is the basis for sentencing such a person as a second, third or fourth felony offender, the date or dates of such prior conviction or

Appendix II

Additional Statutes Pertinent Thereto

convictions and the court or courts in which such prior conviction or convictions was had and said clerk shall include such facts in the certified copy of the sentence of such person which shall be delivered to the sheriff of the county in which such conviction shall be had." Added L. 1949, c. 66. Examended L. 1957, c. 265, eff. April 25, 1957."

§ 54.139 Comp. Gen. Stat. (1958 Rev.)

"No demand for the extradition of a person charged with crime in another state shall be recognized by the governor unless in writing alleging, except in cases arising under section 54.162, that the accused was present in the demanding state at the time of the commission of the alleged crime, and that thereafter he fled from the state, and accompanied by a copy of an indictment found or by information supported by affidavit in the state having jurisdiction of the crime, or by a copy of an affidavit made before a magistrate there, together with a copy of any warrant which was issued thereupon; or by a copy of a judgment of conviction or of a sentence imposed in execution thereof, together with a statement by the executive authority of the demanding state that the person claimed has escaped from confinement or has broken the terms of his bail, probation or parole. The indictment, information or affidavit made before the magistrate must substantially charge the person demanded with having committed a crime under the law of that state; and the copy of indictment, information, affidavit, judgment of conviction or sentence must be authenticated by the executive authority making the demand. (1957, P.A. 362; S. 3.)"